



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Industrial Data Link Corporation

File: B-246682

Date: March 19, 1992

Pamela J. Mazza, Esq., Piliero, Mazza & Pargament, for the protester.

Douglas P. Larsen, Jr., Esq., Stephen E. Katz, Esq., and Jeffrey A. Mansfield, Esq., Department of the Navy, for the agency.

Mona K. Mitnick, Esq., for the Small Business Administration.

Kenneth D. Brody, Esq., Keck, Mahin & Cate, for Prospective Computer Analysts, Inc., an interested party.

Daniel I. Gordon, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where procurement was initially synopsisized in the Commerce Business Daily as a small business set-aside, and subsequently accepted into the Small Business Administration's (SBA) Section 8(a) program only because SBA incorrectly understood the relevant facts, withdrawing the procurement from the 8(a) program and reconverting it to a small business set-aside, once SBA had been apprised of the actual situation, was proper.

DECISION

Industrial Data Link Corporation (IDL) protests the decision by the Department of the Navy to convert the requirement under request for proposals (RFP) No. N00123-91-R-5084 from a set-aside for participants in the Small Business Administration's (SBA) section 8(a) program to a total small business set-aside. IDL contends that the agency acted in bad faith and in violation of the applicable regulation in withdrawing the procurement from the 8(a) program.

We deny the protest.

By letter dated December 4, 1989, the San Francisco Regional Office of SBA wrote to the Small and Disadvantaged Business Utilization Specialist (Specialist) for the Naval Regional Contracting Center (NRCC) in San Diego, California, and

asked the NRCC official for assistance in identifying potential contracting opportunities in a specified field, including engineering support for hardware. The services identified were those covered by the RFP at issue in this protest. In this December 1989 "search letter," SBA stated that it was making the request on behalf of IDL, an 8(a) program participant.

NRCC apparently took no action as a result of receipt of the letter before the specialist left her position in April 1990. Her position remained vacant for several months, until another specialist succeeded her in July 1990. When the NRCC contracting officer, who was unaware of the search letter, decided in September 1990, to issue the RFP as a small business set-aside, the specialist concurred in that decision. At that time, neither the contracting officer nor the specialist believed that NRCC intended that the procurement be made an 8(a) set-aside. Accordingly, on October 4, 1990, the procurement was synopsized in the Commerce Business Daily (CBD) as a total small business set-aside.

Shortly after October 4, 1990, the specialist discovered the December 1989 search letter in the files left behind by his predecessor. The specialist promptly consulted with the contracting officer and a decision was made to propose to SBA that the procurement be accepted in the 8(a) program. In an October 26, 1990, letter to SBA, the specialist stated that, although a CBD small business set-aside notice had already been issued, the agency had changed its proposed business strategy and had decided to issue the RFP as an 8(a) set-aside. An October 30, 1990, letter from SBA authorized the Navy to announce the 8(a) set-aside in the CBD and to issue the RFP. Accordingly, the January 22, 1991, CBD carried a "corrected" announcement, in which the agency stated that the RFP would be issued as a competition among eligible 8(a) program participants. In an April 30, 1991, memorandum to SBA concerning the change, the specialist wrote that NRCC, "as far back as December 1989, had decided to make the requirement an 8(a)."

Prospective Computer Analysts, Inc. (PCA), a small business that is not a participant in the 8(a) program, protested to SBA that it was improper for that agency to accept the procurement into the 8(a) program after the RFP had been synopsized in the CBD as a small business set-aside. PCA asserted that SBA's action violated 13 C.F.R. § 124.309 (1991), which bars SBA from accepting into the 8(a) program a procurement for which the agency has issued a CBD small business set-aside notice except:

"under extraordinary circumstances, such as where a procuring agency had made a decision to offer the requirement to the 8(a) program before the [CBD] notice was sent out and the procuring agency acknowledges and documents that the notice was in error."

The ensuing correspondence with NRCC eventually led SBA to conclude that the October 1990 CBD notice identifying the procurement as a small business set-aside was not the result of any error, because NRCC had not decided, by October 4, 1990, that the requirement should be satisfied through the 8(a) program. Accordingly, SBA, in an October 28, 1991, letter to the contracting officer, rescinded its earlier acceptance of the procurement for the 8(a) program. In light of SBA's action, NRCC published a third CBD notice, on October 31, 1991, this time converting the procurement back to a small business set-aside. Thereupon, IDL filed this protest against the withdrawal of the procurement from the 8(a) program, contending that the withdrawal violates 13 C.F.R. § 124.309 and that NRCC officials acted in bad faith.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), authorizes SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. Because of the broad discretion afforded to SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the section 8(a) program is generally limited to determining whether government officials have violated applicable regulations or engaged in fraud or bad faith. See 4 C.F.R. § 21.3(m)(4) (1991); Lecher Constr. Co.--Recon., B-237964.2, Jan. 29, 1990, 90-1 CPD ¶ 127.

IDL contends that SBA violated 13 C.F.R. § 124.309, the regulation relied on by SBA in both its 1990 acceptance of the procurement for the 8(a) program and its 1991 rescission of that acceptance. As noted above, that regulation bars SBA from accepting into the 8(a) program a procurement for which the agency has issued a CBD small business set-aside notice except under extraordinary circumstances. The regulation does not require SBA to accept a procurement into the 8(a) program, even where such circumstances exist.

Nonetheless, IDL takes the position that extraordinary circumstances existed here and that it was therefore improper for SBA not to accept the procurement in the 8(a) program. IDL contends that those circumstances existed because NRCC had decided to offer the requirement to the 8(a) program, or at least was considering doing so, before the CBD notice was sent out, thus establishing that the notice was

published in error. In our view, SBA reasonably determined, admittedly after considerable confusion, that the requisite extraordinary circumstances did not exist: NRCC had not decided to offer the requirement to the 8(a) program before the CBD notice was published and the CBD notice thus was not the result of an error.

SBA's original decision to accept the procurement in the 8(a) program was premised on the assumption that an error had occurred. SBA viewed the Navy's first request to change the status of the procurement as effectively a confession of error. This view was understandable because SBA was aware of the December 1989 search letter, and could have assumed (as did the specialist for a time) that NRCC had decided, based on the search letter and before the CBD notice was published, to offer the procurement for inclusion in the 8(a) program. SBA's initial conclusion was, therefore, that the situation represented precisely the circumstance in which 13 C.F.R. § 124.309 permits SBA to accept a procurement for the 8(a) program despite a CBD small business set-aside notice having been issued.

Once SBA was correctly apprised of the sequence of events, however, it became clear to SBA that no error had been involved in NRCC's original issuance of the CBD notice. NRCC had not decided, before October 1990, to offer this procurement for the 8(a) program. In fact, the agency does not appear to have even considered SBA's December 1989 search letter in that timeframe. The mere existence of the search letter proves nothing about NRCC's intent, since it was written by SBA.

Because NRCC did not issue the original CBD notice in error, SBA was barred by 13 C.F.R. § 124.309 from accepting the procurement into the 8(a) program. L. Washington & Assoc., Inc., B-241950.2, June 25, 1991, 91-1 CPD ¶ 600. Accordingly, it was fully consistent with the applicable regulation for SBA to rescind its earlier acceptance and for NRCC to issue the solicitation as a small business set-aside. Id.

Beyond the allegation of violation of the regulation, IDL contends that NRCC officials acted in bad faith. To show bad faith, the protester must establish that the procuring agency acted with a malicious and specific intent to injure the protester. Lecher Constr. Co.--Recon., supra. The record is devoid of evidence of bad faith.

The contracting officer and the contract specialist reached the initial decision to make the procurement a small business set-aside on the assumption that no decision had been made by NRCC to offer the requirement as an 8(a) procurement. Indeed, it appears that neither was aware, prior to

October 4, 1990, of the existence of the December 1989 search letter.¹ The decision to issue the first CBD notice as a small business set-aside thus did not reflect bad faith.

Once the contracting officer and the specialist became aware of the search letter, they acted promptly to offer the procurement to SBA for inclusion in the 8(a) program. This action by the two officials controverts IDL's presumption that NRCC officials were motivated by a desire to use a non-8(a) firm for the procurement.


Finally, we find no evidence of bad faith associated with the procurement being shifted back from the 8(a) program to its earlier status as a small business set-aside. It is true that the record includes inconsistent written statements by the specialist about whether NRCC had at any point before October 1990 decided to handle the procurement as an 8(a) set-aside. His April 30, 1991, memorandum indicates his belief that, as early as December 1989, NRCC had decided to make the procurement an 8(a) contract--which, if true, would mean that the original CBD announcement was issued in error. In an affidavit filed in the course of the protest, however, the specialist explained that the statement in his April 30, 1991, memorandum was based solely on his erroneous assumption that the existence of the December 1989 search letter indicated that the agency at that time had made a decision to offer the procurement for the 8(a) program. We find the specialist's explanation, which is uncontradicted in the record, credible. His willingness to recognize that he had earlier made a faulty assumption certainly does not demonstrate bad faith.

The contracting officer's actions likewise do not evidence bad faith. Although IDL suggests that his repeated contacts with SBA were suspicious, that suggestion is unfounded.

¹The protester and NRCC have submitted conflicting affidavits about whether IDL's contracts manager had a meeting with the specialist in late August 1990, mentioned the search letter, and was told that NRCC intended to offer the procurement to SBA for the 8(a) program. However, resolution of the conflict in the affidavits does not affect the outcome of the protest. Even if it is assumed, arguendo, that the August 1990 meeting occurred precisely as IDL contends, it does not establish that the agency had decided by that time to issue the RFP as an 8(a) set-aside, since the specialist did not have authority to make such a decision and could have merely assumed, as he apparently did later, that the existence of the search letter meant that NRCC had decided to offer the procurement for inclusion in the 8(a) program.

Those contacts put the contracting officer in the awkward position of having to explain his agency's inconsistent prior actions, and the sole plausible motivation for them appears to have been a desire to ensure that SBA understood the precise sequence of events.² Accordingly, we find no credible evidence of bad faith on the part of NRCC officials.

The protest is denied.


for James F. Hinchman
General Counsel

²The protester also cites as evidence of bad faith a document in which the contracting officer was paraphrased as saying that it had always been his intent that the procurement be competed under the Section 8(a) program. The contracting officer, however, explains in an affidavit that, once it was decided to utilize the 8(a) program, it was always his intent to conduct a competition among 8(a) companies, rather than to award a sole-source contract (as IDL repeatedly requested). The protester provides no plausible reason to question the veracity of the contracting officer's explanation, and we find this explanation consistent with the evidence of record.